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ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

Act of U. S. 1862, *c.* 119—*License to sell Liquor—State Laws.*—A license granted under St. of U. S. of 1862, c. 119, does not authorize the sale of intoxicating liquors in this Commonwealth, in violation of the statutes of this Commonwealth: *Commonwealth* vs. *Thornley.*

Promissory Note—Payable in Specie—Recovery under.—The plaintiff in an action upon a promissory note payable on demand in specie can only recover judgment for the amount of the face of the note and interest thereon, although he offers to prove that at the time when payment of the note was demanded, specie was worth a premium above par: *Wood* vs. *Bullens.*

Arbitrators—Award of Transfer of specific Personal Property.—Arbitrators under a statute submission have no authority to award that one of the parties shall transfer to the other a specific article of personal property: *Brown* vs. *Evans.*

An award by arbitrators under a statute submission that one of the parties shall recover of the other a certain sum of money, and transfer to him a specific article of personal property, is wholly invalid: *Id.*

[1] From Charles Allen, Esq., to appear in Vol. VI. of his Reports.

Will—Claim by Widow waiving Provisions of Husband's Will—Assets —Construction.—In computing the amount of a widow's share in the estate of her husband, under Statute 1861, ch. 164, upon her waiving the provisions of his will in her behalf, promissory notes held by him at the time of his death, and given by him in his will to the makers thereof, are to be regarded as assets; and the personal property is to be estimated at its value at the time of distribution: *Plympton* vs. *Plympton et al.*

If a testator bequeaths the income of certain property to his wife so long as she lives and remains his widow, for the support of herself and her two children, and she waives the provisions of the will in her behalf, the two children are entitled to the whole of such income during the time specified: *Id.*

If a testator who bequeaths the income of certain property to his wife, so long as she lives and remains his widow, for the support of herself and her two children, and appoints her guardian of said children, provides also that during that time no change in any investment shall be made without her consent, her waiver of the provisions of the will in her behalf does not give to the trustees of the property the right to change investments without her consent: *Id.*

Municipal Corporation—Payment of Expenses in procuring its Charter— Procuring of Legislation not a legal Consideration for Contract.—Under St. 1847, c. 37, this court have jurisdiction in equity, upon a proper case being made, to compel the restoration of money, with interest thereon, to the treasury of a town, which has been taken therefrom and applied to illegal purposes by officers of the town, under a vote of a majority of the inhabitants thereof: *Frost et al.* vs. *Belmont et al.*

A town has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence as a town, in procuring the passage of its charter: *Id.*

Services rendered in procuring the passage of an act of legislation by means of secret attempts to secure votes, or sinister or personal influences upon members, are not a legal consideration for a contract: *Id.*

In taxing costs for counsel fees, to be paid out of a fund in controversy, the court will not allow all charges which may be proper in a particular case, as between counsel and client, but will refer as a general guide to the compensation usually paid to public officers for services of a similar character: *Id.*

NEW YORK SURROGATE COURTS.[1]

Letters of Administration—Application for, by Persons not having the Prior Right.—The provision of the Statute 3 Rev. Stat. 5th ed. 160, § 35, providing that where an application for administration is made by a person other than the one having the prior right, the applicant shall file a written renunciation of persons having such prior right, or a citation shall be issued to such persons to show cause,—must be construed strictly. Nothing will satisfy the statute but a *written* renunciation, or a citation to show cause: *Barber* vs. *Converse.*

Thus, where letters of administration were granted to D. B. and A. B., who had the prior right, but were revoked on their failure to give new securities, and letters were subsequently granted to C., who was next entitled to them: *Held*, that D. B. and A. B. were entitled to notice of the application of C. The failure of D. B. and A. B. to furnish new sureties, does not amount to a "*written renunciation,*" within the meaning of the statute; nor does the previous notice or citation served on them to appear and file new sureties, dispense with the necessity of service of a citation on them, upon C.'s application: *Id.*

Where letters of administration have been irregularly issued, without citing those having a prior right to the administration, they will be revoked: *Id.*

Will—Absence of Attesting Witness from the State.—Mere absence of an attesting witness from the state, abroad on a journey or tour, does not authorize proof of the will by proving the handwriting of the testator and of the witness. To entitle such testimony to be given, the witness must reside out of the state: *Stow* vs. *Stow.*

The statute providing for such proof, where all or any of the witnesses "reside" out of the state (3 Rev. Stat. 5th ed. 139, 140, §§ 9, 12), imports something more than mere absence from the state. The word should be taken in its broadest legal signification, and means actual residence without regard to the domicil: *Id.*

Will—Want of Mental Capacity—Failure of Memory—Influence.—Where no failure of memory was exhibited at the time the will was executed, and the testator is not shown to have had any disease of the

[1] To appear in a forthcoming volume of Surrogate Court Reports, by Amasa A. Redfield, Esq., of New York.

brain which permanently impaired his mental faculties: *Held*, that the facts of his old age, declining health, and his failure to recollect or understand certain transactions, do not prove a want of mental capacity to make a will: *Clarke* vs. *Davis*.

A statement made by the testator, after the execution of a codicil, to a daughter whom he had therein disinherited, that he had given her the sum of $600, and no such sum appeared in the will: *Held*, not sufficient to prove a want of capacity. The capacity of a testator to make a will must be determined by what happened at its execution, and not what afterwards occurred: *Id.*

The influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment, nor the desire of gratifying the wishes of another. The proof must be that the act was obtained by coercion; by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. The natural influence of a wife, arising from her relations with the testator, without proof of any specific acts, will not amount to such coercion: *Id.*

SUPREME COURT OF WISCONSIN.[1]

Mandamus—Issue of Peremptory Writ stayed on suggestion of Collusion. —Where the return of a register of deeds to an alternative writ of *mandamus* to compel him to hold his office at a place alleged to be the county seat, according to the result of a certain election, was adjudged insufficient on demurrer, and the relator having moved for a peremptory writ, the clerk of the court of the same county presented affidavits alleging *collusion* between the relator and the register, and that similar suits had been commenced against other officers of that county to test the same question, in which issues of fact had been joined, it was *held*, that proceedings in the action against the register should be stayed until the further order of the court after a trial of the issues of fact should have been had: *State of Wisconsin ex rel. Field* vs. *Avery*.

Such a suit is not to be treated as a mere private one, inasmuch as it presents a question of public importance, and one which ought not to be decided one way in one suit and differently in another, thus establishing two county seats: *Id.*

[1] From P. L. Spooner, Esq., State Reporter. To appear in Vol. XV. of Wisconsin Reports.

Constitutional Law—Witnesses—Farm Mortgages.—An act of the legislature requiring the reference of actions to foreclose the so-called *farm mortgages*, to some person to be named by the court, who should take all the testimony to be taken in the state, which either party might desire to use on the trial, is unconstitutional, since it deprives the party of his constitutional right to have his witnesses examined in open court: *Oatman* vs. *Bond, impleaded, &c.*

An act of the legislature which discloses in all its provisions an intention so to interpose obstacles and delays in the way of enforcing the class of mortgages therein referred to (farm mortgages, so-called), as to leave the creditor without any substantial remedy, impairs the obligation of contracts, within the meaning of the Constitution of the United States, and of the state of Wisconsin, and is, therefore, inoperative and void. Per COLE, J.: *Id.*

Such an act is also invalid under the clause of the Wisconsin Bill of Rights, which affirms, that "every person is entitled to a certain remedy in the laws for all injuries or wrongs, which he may receive in his person, property, or character," &c. Per PAINE, J.: *Id.*

Constitutional Law—Tax—City Charter.—Where the charter of a city, at the time of the issue and sale of its bonds, made it the duty of the Common Council, when any judgment should be rendered against the city, to levy and collect the amount like any other city or ward charges, and declared that private property should not be taken on execution to pay any city debt, a subsequent act of the legislature prohibiting the city from levying such a tax as would be necessary to discharge a judgment rendered against it for interest on said bonds, would deprive the creditor of the only efficient means of collecting his debt, and would be repugnant to the constitution: *State of Wisconsin ex rel. Soutler* vs. *The Common Council of Madison.*

The duty of the Common Council of the city issuing such bonds to levy a tax to meet them, or the interest on them, is continuing, and does not cease with the levying of one tax which is in part uncollected. It ends only when the money is collected, and the debt is actually paid: *Id.*

It makes no difference in such a case, that the judgment against the city was rendered by a court of the United States; the court will award a *mandamus* to compel the Common Council of the city to levy and collect a tax for the payment of such a judgment; and if the Mayor and a part of the Common Council should go out of office after the alternative writ is

served, their duties in the premises would devolve on their successors, and the peremptory writ be directed to and enforced upon the Mayor and Common Council generally: *Id.*

Statute of Limitations.—The decision in *Parker* vs. *Kane*, 4 Wisc. R. 1, that an action may be barred by a statute of limitations passed after the cause of action accrued, if a sufficient and reasonable portion of the time of limitation, within which the bill might have been filed, remained after the enactment of the statute, cited and approved: *Howell* vs. *Howell.*

Judge's Salary assignable—Estoppel—Mandamus to State Treasurer.—The salary of a judge, to become due, is a possibility coupled with an interest, and, as such, capable of being assigned: *State ex rel. State Bank* vs. *Hastings.*

A circuit judge delivered to the Iowa County Bank, on the 3d of August, his order upon the treasurer of state, directing him to pay to said bank, or *order*, on the 1st of October following, a certain sum "in full for my (his) quarter's salary commencing on that day," the order being drawn *without value*, and intended by the parties as a mere authority to the bank to receive and hold the money for the judge's use. The Iowa County Bank indorsed the order, for full value, before maturity, to the State Bank, which purchased it without any notice of the rights of the drawer, except such as is to be implied from the order itself. *Held*, that the drawer, after having, by proper documentary evidence of title, clothed the Iowa County Bank with the apparent ownership of the fund, is estopped, as to *bonâ fide* purchasers for value, from asserting that such apparent ownership was not the real ownership: *Id.*

The state treasurer having refused to pay said order, on the ground that its payment was countermanded by the circuit judge, the court awarded a *mandamus* to compel its payment, it appearing that he had sufficient funds in his hands applicable to that purpose: *Id.*

Constitutional Law—Compensation for Lands flowed by Mill-dam.—An act of the legislature authorizing proprietors of a mill-dam to flow lands of other persons, without any provision for compensation, except that they should pay the landowners the value of the land, to be ascertained by the verdict in an action of trespass, is in violation of that section of the constitution which forbids the taking of private property for public use without making compensation therefor: *Newell* vs. *Smith.*

A person who purchases land *already* flowed in consequence of a dam,

and for which no compensation in gross has ever been made, may recover for injury done to the land by the maintenance of the dam *after* he purchased the estate: *Id.*

Common Carrier—Negligence—Condition in Bill of Lading.—Whether a common carrier can limit or evade his common law liability by an express contract, *quære: Falvey* vs. *N. Tr. Campany.*

Where a condition that the owner of goods assumed the risk of loss by lake navigation and damages from unavoidable or accidental delay, was contained in a bill of lading delivered to the shipper in New York, but the owner of the goods lived in Wisconsin, and there was no proof that he ever assented to or had any knowledge of such condition, the court would hardly feel authorized to say that there was a a special contract between the parties, by which the owner agreed to take any risk which the law would otherwise impose upon the carrier: *Id.*

Where the goods mentioned in such bill of lading were delivered to a transportation company in the city of New York on the 10th of November, to be carried to a port in Wisconsin, by steam on the lakes, and the goods were not received at Buffalo until the 22d or 23d, though the usual time for transporting goods between those cities by such company was only about three days; and a few hours after leaving Buffalo, the vessel on which the goods were put was wrecked and the goods lost: *Held*, that the delay in transporting the goods to Buffalo, was, in view of the increased dangers of lake navigation as winter approached, *primâ facie* proof of negligence, and cast upon the company the burden of showing that the delay was fairly within the exception contained in the bill of lading: *Id.*

SUPREME COURT OF NEW HAMPSHIRE.[1]

Easement—Mill-dam—Presumption of Grant—Equity—Demurrer for want of Equity—Nuisance—Jurisdiction.—If the owner of the land on one side of a river erects a mill-dam across the river and abuts the same upon the opposite shore, and continues and maintains the same for twenty years in that position, that would be evidence of a grant or right to build and maintain such a dam, constructed and used substantially in the same manner: *Burnham* vs. *Kempton.*

But it is not evidence of a right to approximate all the water-power that

[1] For these notes of very recent decisions we are indebted to the kindness of the judges.

might be created by such dam to the use of the person who thus built and maintained the dam: *Id.*

A dam is an instrument for turning water to the use of a mill, as a bulkhead is the means of drawing the water from a dam, but neither may in fact have been used for either purpose at all, or if at all, in any such a way as to change or affect the original rights of the riparian owners on either side: *Id.*

Twenty years use of the water of a stream in a particular way is evidence of a right thus to use the water: *Id.*

The same proof of user which establishes the right is equally conclusive in establishing the limitation of that right: *Id*

Want of equity is not only good ground of demurrer to a bill, but is a good ground of defence where no case is established upon the *merits*, and this includes cases where the plaintiff's right proves to be one at law and not one in equity: *Id.*

Ordinarily courts of equity will exercise a concurrent jurisdiction with courts of law in cases of private nuisance, only when they can restrain irreparable mischief, suppress interminable litigation, or prevent a multiplicity of suits: *Id.*

And in such cases courts of equity will not ordinarily take upon themselves to decide the fact, that a nuisance exists, when that fact is controverted, but will require that the party asking the interference of the court shall first establish his right at law: *Id.*

But in some cases, where the party has been long in the quiet and uninterrupted enjoyment of a right, or where the injury threatened would be irreparable, another party will be restrained from interfering with that right, or doing that injury, until he establishes his right at law: *Id.*

Nor does that large class of cases involving an inquiry into the rights of the owners of water-power in connection with mills and machinery, stand upon grounds substantially different in these respects, from other cases of private nuisance: *Id.*

Where the rights of several owners in the same water-power or privilege are admitted or have been established at law, a court of equity will entertain jurisdiction to regulate the use of the water, and to fix and establish the extent of their respective rights so as to give each proprietor or owner the just proportion of water to which he is entitled: *Id.*

But a court of equity will not entertain jurisdiction of a cause, under any pretence of adjusting rights in common to water-power, where it is

apparent that all that is sought by the parties or either of them, is to settle and establish a disputed right, for the establishing of which the parties have a plain and perfect remedy at law: *Burnham* vs. *Kempton.*

Statute of Limitations—Absence from the State—The Provision applies to those who have never been Residents of the State—The Statute does not belong to the Law of the Place of Contract, but of Remedy.—The provisions of the Statute of Limitations that "if the defendant at the time the cause of action accrued or afterwards, was absent from and residing out of the state, the time of such absence shall be excluded in the computation of the several times before limited for the commencement of personal actions," applies to defendants who have never resided in the state, as well as to those who have once resided in it and have removed from it: *Paine et al.* vs. *Drew.*

Citizens of other states are allowed to sue in our courts upon the same ground on which our own citizens stand, and with the same rights in the application of the remedy that the latter possess: *Id.*

Therefore a citizen of the state of Maine suing a citizen of Massachusetts in our courts, and the court having acquired jurisdiction of the parties by legal service upon defendant, the Statute of Limitations is not available as a defence in any other manner than as though the plaintiff was a citizen of this state: *Id.*

Ordinarily the Statute of Limitations of a state does not in any way attach itself to or affect the contract; it is no part of the *lex loci contractus,* but it affects and limits the remedy merely, and belongs purely to the *lex fori: Id.*

Hence, such a statute does not operate as a discharge of a contract or as a defence against the contract itself, but is interposed as a bar to the maintenance of an action; it limits the time within which the remedy must be pursued or applied: *Id.*

An action may be maintained in our courts, when not barred by our Statute of Limitations, upon a contract made in another state, though an action thereon may be barred by the statute of the state where the contract was made and was to be performed: *Id.*

Easement—Grant of Right of Way—Reserved Rights of Grantor.—Nothing passes as incident to the grant of an easement but that which is necessary for its reasonable and proper enjoyment: *Bean* vs. *Coleman.*

The grant of a private pass-way or right of way over a portion of the grantor's land, without any reservation of the right to erect bars or gates

across said way, does not necessarily imply a negation of the owner's right to enclose his land and to erect gates across said way: *Id.*

Notwithstanding such a grant, there remains with the grantor the right of full dominion over, and use of the land except so far as a limitation of his right is essential to the fair and reasonable enjoyment of the right of way which he has granted: *Id.*

Mutual Accounts—Off-set—Statute of Limitations.—Where there are mutual accounts between the parties, and the plaintiff brings suit on his claim, and the defendant files his account in off-set, the plaintiff may plead the Statute of Limitations to this off-set, but only so much of the defendant's account will be barred by the statute as had accrued more than six years prior to the date of the plaintiff's writ: *Rollins* vs. *Horn.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. By HORACE GRAY, JR. Vol. X. Boston: LITTLE, BROWN & Co., 1864.

We have here the last but two of the long-expected volumes of Mr. Gray. The profession, doubtless, generally understand the cause and the necessity of this delay as existing chiefly in the inability of Chief Justice SHAW, in consequence of the increased amount of business in the court, and the advanced period of his life, to keep his opinions always up to the demands of the reports. We shall now soon be in possession of the last of this long-delayed series. This volume contains some important cases, rendering it valuable in itself, as well as indispensable to complete the series.

I. F. R.

ILLINOIS PLEADINGS AND PRACTICE. By SABIN D. PUTERBAUGH. 1 Vol. pp. 617. Published by HENRY NOLTE, Peoria, and E. B. MYERS, Chicago, Illinois.

The above work, of which the publishers have sent us a copy, is a pioneer in a difficult and nearly uncultivated field. To one who knows the utter chaos in which the practice of the law is involved in Illinois, it would seem a miracle were the book not to contain serious faults. Mr. Puterbaugh gives us an idea of the condition of that practice when announcing "the sources that govern the practice of the circuit courts of this state," as he phrases it. "Those sources," he says, "are the rules and orders of courts, together with statutory provisions and judicial